No. 15,683

United States Court of Appeals

For the Ninth Circuit

W. S. PEKOVICH and ADMIRALTY ALASKA GOLD MINING COMPANY, a corporation,
Appellants,

vs.

MINNIE COUGHLIN, as Executrix of the Estate of Robert E. Coughlin, deceased,
Appellee.

APPELLEE'S BRIEF.

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JURISDICTION.

This action was tried in the District Court for the District of Alaska, Division Number One, at Juneau, by the Honorable Raymond J. Kelly, Judge, without a jury. From judgment rendered in favor of the appellee, this appeal has been taken. This honorable court has jurisdiction under the provisions of Title 28 U.S.C.A., Section 1291.

FACTS.

On February 5, 1954, at a meeting of the Admiralty Alaska Gold Mining Company, C. J. Ehrendreich, the

secretary-treasurer, resigned, stating as a reason therefor that the salary of $75.00 a month "was not ample compensation for the amount of work it was necessary for him to perform for the company." Appellant Pekovich then suggested that R. E. Coughlin, who was present at the meeting, take over the duties of secretary-treasurer. (R. 88.) On this same date Mr. Pekovich gave Mr. Coughlin a handwritten letter stating:

> "This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection the D.M.E.A. Admiralty Alaska matter, I will give you in compensation therefor or cause to be given you 4,000 four thousand shares of the Admiralty Alaska Gold Mining Co. Stock." (R. 27.)

According to a report signed by Mr. Coughlin as secretary-treasurer, the Securities and Exchange Commission had made an investigation of the company in December, 1953, which resulted in the market price of the stock breaking from 35¢ to below 15¢ a share. (R. 140.) Mr. Pekovich testified that on February 5, 1954 the stock had a value of about 20¢ or 25¢ a share. (R. 50.)

During 1954 Mr. Coughlin drew a salary of $75.00 per month in quarterly installments and in 1955, he drew the same salary at monthly intervals. At the February 5, 1955 annual meeting of the stockholders, Mr. Coughlin was authorized to continue in that employment at the rate of $75.00 per month and he did so continue until his death on September 22, 1955. (R. 9.)

It was admitted that Mr. Coughlin performed the services as specified in the letter of February 5, 1954 and that neither Mr. Pekovich or the corporation made payment of the 4,000 shares of stock. (R. 7.)

Mr. Coughlin worked three or four full days, and many nights, each week for the corporation and also worked more than that during the winter. (R. 130, 131, 123.) He expected to receive the 4,000 shares from Mr. Pekovich in addition to the $75.00 monthly salary. (R. 122, 129, 135, 127.) The payment of the shares was delayed due to the Securities and Exchange Commission holding up transfer of Mr. Pekovich's shares. (R. 131, 70.)

After Mr. Coughlin's death, the work was undertaken by one Mr. Dapcevich. The corporation was no longer engaged in a Defense Minerals Exploration Program so that the burden of reports and correspondence in relation thereto did not have to be carried on by Mr. Dapcevich. (R. 104.) Although he initially was hired for a salary of $75.00 per month, he soon found that the work was too time consuming for that salary and his salary was increased $50.00 after eight or nine months. (R. 98.)

According to the minutes of the meeting of the corporation of February 5, 1955, Mr. Pekovich, the general manager of the corporation, owned 1,131,143 shares of the stock of the corporation. These same minutes, which were signed by Mr. Roden, the president, showed Mr. Coughlin as having 5,000 shares. (R. 93.) Several years prior to 1954, Mr. Coughlin had been given a certificate for 1,000 shares to qualify

him as a director, but he had never actually received the additional 4,000 shares.

Mr. Pekovich was the one who gave instructions in the operation of the office of the corporation and was the principal person concerned with the corporation. (R. 102.) He never told Mr. Coughlin that his salary of $75.00 per month was in place of the stock promised by the letter of February 5, 1954 (R. 58) and he never asked for a return of the letter which he gave to Mr. Coughlin for the purpose of having it available in case either of them died. (R. 62.) A letter written by Mr. Pekovich to Mr. Roden, president of the corporation, referred to the agreement to give Mr. Coughlin the 4,000 shares of stock and the fact that Mr. Coughlin drew a salary of $75.00 per month, but did not claim that the stock was no longer due Mr. Coughlin because of drawing the salary. (R. 70.)

Based on the evidence adduced at the trial, the learned trial judge found that R. E. Coughlin was to receive a salary of $75.00 per month and that as an additional inducement to have him perform the work, Mr. Pekovich agreed to give or cause to be given to Mr. Coughlin 4,000 shares of the stock of Admiralty Alaska Gold Mining Company. (R. 12.) This appeal has been taken from the resulting judgment awarding the stock to the executrix of Mr. Coughlin's estate.

SUMMARY OF ARGUMENT.

The brief heretofore filed by appellants sets forth no alleged errors of law and is limited to a contention

that the findings of fact and judgment entered thereunder by the court below was not based upon the evidence. A reading of the statement of the case as set forth in the appellants' brief and the argument which follows reveals that appellants' contentions are based on viewing the evidence and inferences therefrom in the most favorable light to appellants' case while disregarding the evidence and inferences supporting the judgment below. It is respectfully submitted that learned counsel for appellants have disregarded the applicable principles of law in cases of appeals from findings made by a trial court. It is well established that

> "where there is any admissible or competent substantial evidence on the whole record or reasonable inference therefrom to support the fact determined in the lower court, the fact so determined will not be disturbed on appeal." 5 C.J.S. pp. 554 to 557.
>
> ". . . the province of the appellate court is to determine whether there is any evidence from which the trial court might properly have drawn its conclusion. . . . Such findings will not be disturbed when supported or sustained by competent evidence, especially where the evidence is conflicting or where different inferences can reasonably be drawn therefrom." 3 Am. Jur. Sec. 896, pp. 459 and 461.

This honorable court recently stated in the case of *Hunt Foods v. Phillips,* 248 F. 2d 23 at 31,

> "We cannot substitute our judgment for that of the trial court."

and in earlier cases arising in Alaska this court has held that if there is any substantial evidence in the record sufficient to sustain the findings of the court below, those findings will be upheld on appeal regardless of whether there is conflicting testimony. See *Cascaden v. Bell,* 257 Fed. 926 at 930; *James v. Nelson,* 90 F. 2d 910 at 918; *Schoenwald v. Bishop,* 244 F. 2d 715 at 718; *Cook v. Robinson,* 194 Fed. 753 at 759; *Fleischman v. Rahmstorf,* 266 Fed. 443; *McKinley Creek Mining Co. v. Alaska United Mining Co.,* 183 U.S. 563 at 569, 46 L. Ed. 334.

Admittedly, if all of the testimony in favor of appellee is disregarded and if all of the inferences from the testimony are made adversely to the appellee the case might have been decided in favor of appellants although such a decision, in our opinion, would have been an improper one. The only question on appeal, however, is whether there is any evidence, or when the law is viewed most favorably for the appellants any substantial evidence, supporting the decision of the District Court.

The court below found that Mr. Coughlin was employed by the Admiralty Alaska Gold Mining Company at the salary of $75.00 per month and that in addition thereto as consideration of his performing the work in connection with the Defense Minerals Exploration Administration contract and related matters he was to receive 4,000 shares of Admiralty Alaska Gold Mining Company stock.

This brief will be addressed to the determination of whether there was any substantial evidence upon

which the court made its findings and resulting conclusions of law and judgment.

I.

THERE WAS SUBSTANTIAL EVIDENCE TO THE EFFECT THAT MR. COUGHLIN WAS TO RECEIVE 4,000 SHARES OF STOCK IN ADDITION TO A SALARY OF $75.00 PER MONTH.

Mr. Coughlin served as vice-president of Admiralty Alaska Gold Mining Company for some time prior to 1954. On February 5, 1954, at the suggestion of Mr. Pekovich, he was made the secretary-treasurer of the corporation to replace Mr. Ehrendreich who had resigned due to the fact that $75.00 per month was not adequate compensation for the amount of work involved. Since Mr. Coughlin had been closely associated with the corporation, he was familiar, or must be presumed to have been familiar, with the amount of work involved in the position of secretary-treasurer as well as performing the bookkeeping services for the corporation and the correspondence and other matters pertaining to a Defense Minerals Exploration Administration program. It would certainly be illogical to assume that he would undertake this job at the same salary which caused Mr. Ehrendreich to resign.

Appellants, in their answer, specify that at the meeting of the stockholders on February 5, 1954, Mr. Coughlin was employed to perform the duties previously undertaken by the resigning employee,

> "at the same compensation rate of pay, to wit, $75.00 per month." (See paragraph 3 of the affirmative defense—R. 8.)

The minutes of the stockholders' meeting do not indicate the salary at which Mr. Coughlin was employed, but the minutes are very loosely worded and in view of the admission contained in appellants' pleadings, it must be assumed that the salary was specified at $75.00 a month.

On that same day Mr. Pekovich, who was the principal person concerned with the corporation and who according to the minutes of February 1955 owned over one million shares of the stock of the corporation, wrote a letter to Mr. Coughlin stating,

> "This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection with the D.M.E.A. Admiralty Alaska matter, I will give you in compensation therefor or cause to be given you 4,000 four thousand shares of the Admiralty Alaska Gold Mining Co. stock."

Certainly the reasonable inference to be gathered from the fact that this letter was given on the same date that Mr. Coughlin accepted the employment at the salary of $75.00 per month is that it was to constitute an added inducement. It would be highly illogical for the letter to be given and the salary to be established on the same day on any basis other than that they were to form two complementary means of compensation.

Certainly Mr. Coughlin would not have undertaken this work upon the promise of the stock alone. Mr. Coughlin wrote a letter to all the stockholders indicating that in December 1953 the Securities and Ex-

change Commission had made an investigation of the company causing the stock to drop to below 15¢ a share. (R. 80.) Even Mr. Pekovich testified that in February 1954 the stock had a value of between 20¢ and 25¢ per share. Knowing that the Securities and Exchange Commission was in the midst of its investigation and knowing that the previous employee quit due to dissatisfaction with a salary of $75.00 per month, it is only reasonable to conclude that Mr. Coughlin was to secure both the $75.00 per month and the 4,000 shares as compensation.

This inference is further corroborated by direct testimony which constitutes more than adequate basis for the decision of the court below.

Alaska has a dead man's statute set forth in Section 58-6-1 ACLA 1949 providing:

> "§58-6-1. *Matters affecting credibility: Statements of deceased person.* Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded as witnesses; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case, except the latter, the credibility of the witness may be drawn in question, according to the rules of the common law. When a party to a civil action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased whether oral or in writing concerning the same subject may also be shown."

The Alaska statute, the last sentence of which was enacted by Chapter 49 SLA 1931, is closely modeled

after the Oregon statute. The Supreme Court of Oregon has repeatedly ruled that statements of a deceased are admissible where the opposing party appears as a witness in his own behalf, and such statements have constituted the basis for affirming judgments of the court below. See *Beard v. Beard,* 133 P. 795; *Goff v. Kelsey,* 153 P. 103; *Mace v. Timberman,* 251 P. 763; *In re Fisher's Estate,* .....; *Cook v. United States National Bank of Salem,* 274 P. 1098.

After Mr. Pekovich appeared as a witness in his own behalf, it accordingly became permissible for the appellee to introduce statements made by Mr. Coughlin concerning the same subject.

Mr. Ehrendreich, a disinterested witness (R. 116), testified to a conversation he had with Mr. Coughlin after Mr. Coughlin undertook the job. This conversation is referred to in part in appellants' brief at page 9, wherein it is summarized as follows:

> "Coughlin said: 'I can see now why you kept saying that $75.00 wasn't enough' and I said, 'Well, Bob, my understanding is that you settled for the same thing.' He said, 'Well, I have got some stock'. He didn't mention the amount but he said, 'Well, I have got some stock.' "

The appellants failed to mention, however, that Mr. Ehrendreich went on to testify further pertaining to this conversation as follows:

> "Well, at the time he mentioned, he said, 'I have got stock,' I knew that he had stock in the company prior to that, because he had to have

> at least qualifying shares, so I interpreted it to mean additional stock, and we also discussed from this angle—he said, 'Well, if I get this stock,' that is the way he put it, 'what will be the effect on my personal taxes?' " (R. 122.)

Certainly Mr. Coughlin would not have inquired as to the effect on his personal taxes of securing the stock unless he expected to get the stock in addition to his salary. He could not have been referring to the shares which he had previously received as they had been obtained a number of years prior to the conversation.

Mrs. Turnmire, the step-daughter of Mr. Coughlin, told of a statement by Mr. Coughlin made in the summer of 1955 wherein Mr. Coughlin stated that Mr. Pekovich would give him the stock. (R. 127.)

Mrs. Coughlin told of how Mr. Coughlin brought home the note from Mr. Pekovich promising to give the stock and advised her not to lose the note in case anything happened to him. On many occasions Mr. Coughlin discussed this matter and in fact in the last conversation prior to his death, Mr. Coughlin stated that Mr. Pekovich would give him the stock and that Mr. Coughlin had perfect faith in him. (A. 136.)

Mr. Coughlin had explained that the reason the stock had not been received sooner was due to the Securities and Exchange Commission investigation (R. 131) and this was admitted by Mr. Pekovich R. 70).

Mr. Coughlin had written to the Securities and Exchange Commission setting forth that he had the "beneficial" interest in the stock. (R. 132, 135.)

In view of the direct testimony referred to above, it would appear to be almost superfluous to discuss the additional testimony from which the court could have inferred that Mr. Coughlin was to receive the 4,000 shares in addition to the $75.00 a month.

It is significant that Mr. Dapcevich, who succeeded Mr. Coughlin and who undertook the work at a time that no Defense Minerals Exploration Administration program was in force so that the duties must have been considerably less onerous than at the time that Mr. Coughlin performed them, shortly insisted on a substantial raise to do the work.

It is further significant that Mr. Pekovich stated that he gave the letter of February 5, 1954 to Mr. Coughlin so that the written agreement would be available in case one of them should die. In the year and three-quarters, during which time Mr. Coughlin drew his salary, Mr. Pekovich never asked for a return of that letter. Certainly if he felt that it was important to give the agreement in writing in case of the death of either of the parties and if he honestly believed that the agreement was rescinded, he would have requested the return of the letter.

It is further significant that Mr. Pekovich never told Mr. Coughlin that since he was drawing a salary of $75.00 per month he would not be entitled to the 4,000 shares. (R. 58.)

Counsel makes much point of the fact that the informal letter given by Mr. Pekovich to Mr. Coughlin on February 5, 1954 stated that

> "if you take care of the bookkeeping and other necessary things in connection with the D.M.E.A. Admiralty Alaska matter I will give you *in compensation therefor* or caused to be given you 4,000 four thousand shares."

Counsel infers from this statement that no other compensation could be given Mr. Coughlin for his services as secretary-treasurer as well as in connection with the work described in the letter of February 1954. The letter, however, does not state that it is to be "in full compensation" nor does it state that it is to be "in lieu of salary". It is certainly just as reasonable to infer from the letter that the compensation of the stock was to be in addition to other compensation furnished by the corporation as to infer otherwise. As indicated supra, on appeal inferences in favor of the judgment of the court below rather than opposing inferences will be maintained.

It is further significant that Mr. Pekovich wrote a letter to Mr. Roden, president of the company, discussing the agreement to give the 4,000 shares and the fact that $75.00 per month in salary had been paid to Mr. Coughlin without stating that the salary was to constitute a substitute for the promise of the stock. Instead, Mr. Pekovich merely referred to the fact that the stock could not be transferred before it was registered with the Securities and Exchange Commission. (R. 70.)

Moreover, the minutes of the corporation for the meeting of February 5, 1955 show Mr. Coughlin as owning 5,000 shares. It was admitted that the only shares which had been transferred to Mr. Coughlin were the 1,000 shares he had previously received to qualify him as vice-president and director. Obviously, the additional 4,000 shares indicated as belonging to Mr. Coughlin were the 4,000 promised by Mr. Pekovich. Counsel for the appellants states:

> "Coughlin was the secretary for the company and he prepared the minutes."

There is nothing in the record to show that Mr. Coughlin prepared the minutes and since Mr. Roden, who ~~is~~ WAS president of the company and attorney for the company, was the only one who signed the minutes, the inference is that Mr. Roden prepared the minutes. Moreover, regardless of who prepared the minutes, Mr. Roden, by signing them, indicated that the president of the corporation was under the impression that Mr. Coughlin was entitled to the 4,000 shares in addition to his salary of $75.00 per month.

Appellants refer to the fact that the inventory and appraisement filed by the estate of R. E. Coughlin listed 1,000 shares of Admiralty Alaska Gold Mining stock and did not refer to the additional 4,000 shares. Since Mr. Pekovich had refused to deliver to the estate the additional 4,000 shares, they could hardly be listed as an asset of the estate. The fact that the right to the shares was claimed by the estate is borne out by the authorization to bring this suit. (R. 23.)

From the foregoing it would appear that the greater weight of evidence supported the findings of the District Court leading to judgment for appellee and certainly there is substantial evidence upon which the trial court's judgment may be upheld.

II.

JUST DAMAGES SHOULD BE AWARDED THE APPELLEE FOR DELAY.

Not one objection to evidence or the manner in which this case was conducted has been raised as a grounds for appeal. The only arguments set forth are to the effect that the District Court wrongly decided the case, which argument goes solely to the weight and credibility to be given to the testimony.

An advocate may well lose a sense of proportion pertaining to a case, but if we properly evaluate the evidence in the subject appeal we fail to see any merit to the arguments advanced. If we are correct in that regard and if the appeal may be considered a frivolous one, this learned court is respectfully requested to invoke the provisions of Section 1912 Title 28 U.S.C.A. pertaining to the assessment of costs and damages for delay. See *Fern Gold Mining Company v. Murphy,* 7 F. 2d 613 at 614; *Lowe v. Willacy,* 237 F. 2d 179. In the subject case, the widow of R. E. Coughlin, as administratrix of his estate, has been obliged to employ counsel to defend this appeal. At a considerable expense it has become necessary to print briefs and to pay counsel's expenses in going to the Circuit Court of Appeals for the purpose of arguing

this case. The amount of the stock involved is of highly questionable value, fluctuating, according to the testimony, between 15¢ per share to a maximum of $1.00 per share. It appears that the monetary value of the stock is relatively small in any event and appellants, by requiring appellee to contest this appeal, are depriving Mr. Coughlin's widow of a sizeable portion of the proceeds to which she was entitled under the judgment below.

If our appraisal of the case is correct, it is respectfully submitted that this is a proper case in which damages for delay should be assessed.

CONCLUSION.

There was ample evidence to support the findings of the trial court below to the effect that Mr. Coughlin was to receive 4,000 shares of stock of Admiralty Alaska Gold Mining Company in addition to a salary of $75.00 per month. The statements made by Mr. Coughlin in that regard, plus the inference from all of the evidence adduced in the case, more than amply support the judgment of the court below and it is respectfully submitted that that judgment should be affirmed.

Dated, Juneau, Alaska,
January 13, 1958.

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Attorneys for Appellee.